A

MAJUIKAN SDN BHD

v.

BARCLAYS BANK PLC

B

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
ZAKARIA SAM JCA
ABANG ISKANDAR JCA
[CIVIL APPEAL NO: W-02-491-02-2013]

C

28 OCTOBER 2014

***EVIDENCE**: Expert evidence - Handwriting - Expert opinion - No rebutting expert evidence called - Whether court erred in rejecting expert evidence outright*

D

***EVIDENCE:** Expert evidence - Judicial appreciation of evidence - Whether judge should defer to expert opinion - Whether judge may reject expert opinion outright*

***NEGOTIABLE INSTRUMENTS**: Bills of exchange - Bill of exchange*
E *dishonoured upon presentment - Promissory note containing 'Per Aval Endorsement' dishonoured - Endorsement forged - Whether claimant genuine holder in due course for value of promissory note - When holder of promissory note obtains good title - Whether claimant could demand payment - Whether bill rendered 'wholly inoperative' due to forgery -*
F *Whether doctrine of estoppel applicable - Bills of Exchange Act 1949, ss. 23, 24, 29, 32, 38*

In the High Court, the appellant ('Majuikan') was the second defendant while the respondent ('Barclays') was the plaintiff. The
G first defendant ('Malaysian Sea Best') was not a party in this appeal. Barclays sued Majuikan on the basis of a promissory note containing a 'Per Aval Endorsement' by Majuikan. The maker/ issuer of the promissory note was Malaysian Sea Best. The claim under the Per Aval Endorsement was for a total sum of Euro
H 10,000,000 to be paid by Majuikan to Barclays, it being in the nature of a guarantee for a financing facility granted to Malaysian Sea Best by HSBC Bank, USA ('HSBC USA'), who was the original payee. Barclays sued as holder in due course for value of the promissory note. HSBC USA had, by a transfer power,
I transferred all of its rights, interests and title in the promissory note to Barclays. Under the terms of the promissory note, Malaysian Sea Best promised to pay against the promissory note

to the order of HSBC USA the amount of Euro 10,000,000, payable at the counters of Malayan Banking Berhad (Semenyih branch) on 1 March 2008. Barclays, as holder in due course, presented the promissory note for payment on 3 March 2008 (1 March 2008 being a public holiday). It was dishonoured for non-payment. Barclays then gave notice of this dishonour and demanded that Majuikan pay the amount due on the Per Aval Endorsement. Majuikan, in defending the claim, argued that it did not execute the Per Aval endorsement. The signatures of its alleged signatories on the endorsement were claimed to be forgeries. Majuikan further contended that the two alleged signatories were not authorised by the company to execute the endorsement, and the alleged Board of Directors' circular resolution of the company empowering them to so execute the Per Aval endorsement was also a forged document. Majuikan claimed that Barclays was not in reality a holder in due course as Barclays was involved in the loan right from the start. As such, it was contended that Barclays should not be allowed to shelter behind the legal concept of holder in due course for value, if it was proven on the evidence that the documents were forged. Majuikan tendered a chemist report through a government chemist ('DW14'). However, the trial judge ('the judge') was not convinced there was forgery despite no other expert being called to offer an alternative finding. The judge then allowed Barclays' claim. The primary issue that arose for the court's determination was whether the court could regard Barclays as a genuine holder in due course for value of the promissory note, in the face of alleged forged documents. Barclays claimed that it had done all that was necessary in terms of due diligence to ensure the legal integrity of the financing, and was led to believe that everything was in order by the conduct of the representatives of Majuikan, to the extent that this was a situation where the exception to s. 24 of the Bills of Exchange Act 1949 ('the Act') applied.

Held (dismissing appeal)

Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) On the wording of ss. 29 and 38 of the Act, the holder of a bill/promissory note obtains a good title to it if: (i) the bill is 'complete and regular on the face of it'; (ii) he becomes a holder before it becomes overdue; (iii) he takes it without notice that it has been previously dishonoured, if such was the fact; (iv) he took it in good faith and for value, and at

A the time he took it, he had no notice of any defect in title of the person who negotiated it. The holder in due course then may sue on the bill in his own name, and he holds it free from any defect of title 'of prior parties' and 'mere personal defences' available between these prior parties among
B themselves. (para 19)

(2) Pursuant to ss. 23, 24 and 32 of the Act, the forgery or want of authority will render the bill 'wholly inoperative', unless the maker or indorser of the bill is 'precluded' from setting up the
C forgery or want of authority, in other words, 'estopped' from doing so. (para 29)

(3) Since no other handwriting expert was called, the court really had no plausible basis to reject DW14's evidence outright. While her report was relatively brief, it would be an error to
D simply conclude that therefore the expert had not provided the basis for her analysis and cogent reasons for her conclusions. The court should also proceed to consider the totality of the expert's evidence by considering the expert's
E oral testimony as well. (para 33)

(4) A judge who is not an expert himself should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to
F bring his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case.
G DW14's opinion was not obviously indefensible. On the contrary, her conclusions were supported by the basic facts of the case. (para 35)

(5) The exception under s. 24 of the Act encapsulates the
H doctrine of estoppel. If a man knows that his signature has been forged and by his actions or his silence willingly leads others to believe that the forgery is his genuine signature, he cannot later plead that his signature was forged. Majuikan never took any active steps to alert or inform Barclays of the
I forgery, and in failing to do so, had led Barclays to believe all was in order to Barclays' detriment. Majuikan had chosen to be 'wilfully blind' to the forgery in its relationship with HSBC

and Barclays, and therefore must be held to be precluded from setting up the forgery against them. Hence, Majuikan should be held accountable, even though there was forgery of the documents. (paras 43 & 57)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, perayu ('Majuikan') merupakan defendan kedua manakala responden ('Barclays') adalah plaintif. Defendan pertama ('Malaysian Sea Best') bukan pihak dalam rayuan ini. Barclays menyaman Majuikan berdasarkan surat janji yang mengandungi 'Pengendorsan Per Aval' oleh Majuikan. Pembuat/pengeluar surat janji tersebut adalah Malaysian Sea Best. Tuntutan di bawah Pengendorsan Per Aval adalah bagi jumlah total sebanyak Euro 10,000,000 untuk dibayar oleh Majuikan kepada Barclays, kerana ia bersifat jaminan kemudahan kewangan yang diberikan kepada Malaysian Sea Best oleh Bank HSBC USA ('HSBC USA'), yang merupakan penerima wang asal. Barclays menyaman sebagai pemegang sementara bagi nilai surat janji. HSBC USA telah, melalui kuasa pindah milik, memindah milik kesemua hak-hak, kepentingan dan hak miliknya dalam surat janji kepada Barclays. Di bawah terma-terma surat janji, Malaysian Sea Best berjanji untuk membayar surat janji tersebut bagi perintah HSBC USA dalam jumlah Euro 10,000,000, yang boleh dibayar di mana-mana Malayan Banking Berhad (cawangan Semenyih) pada 1 Mac 2008. Barclays, sebagai pemegang sementara, mengemukakan surat janji tersebut bagi bayaran pada 3 Mac 2008 (1 Mac 2008 merupakan cuti umum). Ia tidak laku atas sebab ketidakbayaran. Barclays kemudiannya memberi notis tidak laku dan menuntut Majuikan agar membayar jumlah yang terhutang terhadap Pengendorsan Per Aval. Majuikan, dalam membela tuntutan tersebut, menghujahkan bahawa ia tidak memeterai Pengendorsan Per Aval. Tandatangan-tandatangan penandatangan-penandatangan yang didakwa pada pengendorsan tersebut dikatakan telah dipalsukan. Majuikan seterusnya menghujahkan bahawa dua penandatangan yang didakwa tidak diberikan kuasa oleh syarikat untuk memeterai pengendorsan, dan pekeliling resolusi Lembaga Pengarah yang didakwa memberikan kuasa kepada mereka untuk memeterai Pengendorsan Per Aval juga merupakan dokumen yang dipalsukan. Majuikan mendakwa bahawa Barclays bukanlah, pada hakikatnya, pemegang sementara kerana Barclays terlibat dengan pinjaman sejak awal lagi. Dengan itu, dihujahkan bahawa Barclays tidak sepatutnya dibenarkan untuk bersembunyi di sebalik konsep perundangan pemegang sementara, jika dibuktikan

A berdasarkan keterangan bahawa dokumen-dokumen tersebut telah dipalsukan. Majuikan telah mengemukakan laporan kimia menerusi ahli kimia kerajaan ('DW14'). Walau bagaimanapun, hakim bicara ('hakim') tidak yakin bahawa terdapatnya pemalsuan walaupun tiada pakar lain yang dipanggil untuk memberikan dapatan
B alternatif. Hakim kemudiannya membenarkan tuntutan Barclays. Isu utama yang timbul untuk diputuskan oleh mahkamah adalah sama ada mahkamah boleh menganggap Barclays sebagai pemegang asli sementara bagi nilai surat janji, dalam dakwaan dokumen-dokumen palsu. Barclays mendakwa bahawa ia telah melakukan kesemua
C yang perlu dari segi ketekunan wajar, untuk memastikan bahawa integriti perundangan bagi kewangan dan mempunyai kepercayaan bahawa kesemuanya teratur melalui tindakan wakil-wakil Majuikan, hingga ke tahap ia menjadi situasi di mana pengecualian s. 24 Akta Bil Pertukaran 1949 ('Akta') terguna pakai.

D

Diputuskan (menolak rayuan)
Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

E **(1)** Berdasarkan perkataan ss. 29 dan 38 Akta, pemegang bil/surat janji mempunyai hak milik sah ke atasnya sekiranya (i) bil adalah 'lengkap dan teratur pada dasarnya'; (ii) dia menjadi pemegang sebelum ia menjadi terhutang; (iii) dia mengambilnya tanpa notis bahawa ia telah menjadi tidak laku, jika demikian
F adalah faktanya; (iv) dia mengambilnya dengan niat baik dan untuk nilai dan pada masa dia mengambilnya, dia tidak mempunyai notis mengenai kecacatan dalam hak milik dan hak milik individu yang merundingkannya. Pemegang sementara boleh menyaman bil tersebut di bawah namanya, dan dia bebas daripada kecacatan hak milik pihak terdahulu dan
G pembelaan peribadi semata-mata yang wujud antara pihak-pihak terdahulu.

(2) Di bawah ss. 23, 24 dan 32 Akta, pemalsuan atau keinginan kuasa akan menjadikan bil tersebut tidak boleh beroperasi
H secara keseluruhannya, melainkan pembuat atau pengendors bil tersebut 'dikecualikan' daripada merancang pemalsuan atau menginginkan kuasa, dalam kata lain 'diestop' daripada berbuat sedemikian.

I **(3)** Oleh kerana tiada pakar tulisan yang dipanggil, mahkamah tidak mempunyai alasan munasabah untuk menolak terus keterangan DW14. Walaupun laporannya singkat, seperti mana laporan-laporan daripada Jabatan Kimia kebiasaannya, adalah

satu kekhilafan untuk menyimpulkan bahawa pakar tersebut tidak memperuntukkan alasan bagi analisa dan alasan-alasan kukuh bagi kesimpulan-kesimpulannya. Mahkamah juga seharusnya terus mempertimbangkan keseluruhan keterangan pakar dengan mempertimbangkan keterangan pakar lisan.

(4) Seorang hakim yang bukan pakar sewajarnya menunda daripada merujuk kepada pandangan pakar melainkan keterangan tidak terbela dan tidak disokong oleh fakta-fakta asas kes. Di mana terdapat keterangan-keterangan pakar yang bercanggah, hakim sudah tentu berhak untuk mempunyai pertimbangan kehakiman beliau ke atas hal perkara ini dan memilih satu berbanding satu lagi tetapi dalam keadaan di mana terdapat satu sahaja keterangan pakar, beliau, sebagai peraturan, tidak seharusnya menolak terus pandangan tersebut tanpa mempertimbangkan secara kehakiman sama ada ia jelas tidak terbela dan tidak disokong oleh fakta-fakta asas kes. Pendapat DW14 jelas terbela. Sebaliknya, kesimpulan-kesimpulannya disokong oleh fakta-fakta asas kes.

(5) Pengecualian di bawah s. 24 Akta merangkumi doktrin estopel. Jika seseorang mengetahui bahawa tandatangannya telah dipalsukan dan dengan tindakannya atau secara diam rela menyebabkan orang lain percaya bahawa pemalsuan tersebut adalah tandatangannya yang asli, dia tidak boleh kemudian memplidkan bahawa tandatangannya telah dipalsukan. Majuikan tidak pernah mengambil apa-apa langkah-langkah aktif untuk memaklumkan atau memberitahu Barclays mengenai pemalsuan ini, dan dengan kegagalannya berbuat sedemikian, telah mendorong Barclays untuk mempercayai bahawa semuanya teratur, menjejaskan Barclays. Majuikan telah memilih untuk 'menutup mata' terhadap pemalsuan dalam hubungannya dengan HSBC dan Barclays, dan oleh itu mestilah diputuskan agar dikecualikan daripada merancang pemalsuan terhadap mereka. Oleh itu, Majuikan perlu bertanggungjawab walaupun terdapatnya pemalsuan dokumen.

Case(s) referred to:

Dr Lo Sook Ling Adela v. Au Mei Yin Christina & Anor [2002] 1 SLR 408 ***(refd)***

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Jones v. Gordon [1877] 2 App Cas 616 ***(refd)***

Lee Shuan Chan v. Lee Shin Kuang @ Lee Sen Bin & Ors [2012] 1 LNS 14 HC ***(refd)***

Mercantile Bank Ltd, Ipoh v. Yoon Siew Kang [1969] 1 LNS 107 FC ***(refd)***
Ming Holdings (M) Sdn Bhd v. Tuan Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC ***(refd)***
PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] 1 LNS 679 HC ***(refd)***
Saeng-Un Udom v. PP [2001] 3 SLR 1 ***(refd)***
Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd And Another Appeal [2011] 3 SLR 540 ***(refd)***
Swan v. The North British Australasian Company [1983] 159 ER 73 ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 23, 24, 29, 32, 38(b)

For the appellant - Sulaiman Abdullah (Raja Ahmad Mohzanuddin Shah Raja Mohzan & Faizah Khamarudin with him); M/s Azmi & Assocs
For the respondents - J Kannaperan (Sathya Kumardas & Marina Nasution with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D8-22-311-2008]

Reported by Amutha Suppayah

JUDGMENT

Mohamad Ariff Yusof JCA:

Introduction: The Parties

[1] Majuikan Sdn Bhd ('Majuikan'), the appellant in this appeal, was the second defendant in the court below. Barclays Bank Plc ('Barclays'), the respondent, was the plaintiff. Majuikan is a wholly owned subsidiary of Lembaga Kemajuan Ikan Malaysia ('LKIM'), a Malaysian statutory body. Barclays is a bank registered in England.

[2] The first defendant, Malaysian Sea Best Sdn Bhd ('Malaysian Sea Best'), is not a party in this appeal. Judgment in default of appearance has been entered against it. Malaysian Sea Best has also been wound up.

[3] For uniformity and ease of understanding we will refer to the parties as follows:

Appellant/second defendant : Majuikan

Respondent/plaintiff : Barclays

First defendant : Malaysian Sea Best

The Subject Matter: Per Aval Indorsement

[4] Barclays sued Majuikan on the basis of a promissory note (dated 1 March 2006) containing a "per aval endorsement" by Majuikan. The maker/issuer of the promissory note was the first defendant, Malaysian Sea Best. The claim under the per aval endorsement was for a total sum of Euro 10,000,000 to be paid by Majuikan to Barclays, it being in the nature of a guarantee for a financing facility granted to Malaysian Sea Best by HSBC Bank, USA ('HSBC USA'), who was the original payee. Barclays sued as holder in due course for value of the promissory note. HBC USA had, by a transfer power (dated 15 March 2006), transferred all of its rights, interest and title in the promissory note to Barclays. The transfer power stated:

> Transfer Power
>
> This Transfer Power is to be attached to and made a part of that certain promissory note (reference the "Sea Best/Euro/HSBC 1 note") dated as of 1st March 2006, made by Malaysian Sea Best Sdn Bhd. In favour of HSBC Bank USA, National Association, having a principal amount of Euro 10,000,000.00.
>
> For value received, the undersigned hereby assigns and transfers unto Barclays bank plc, without recourse, all of its rights, titles and interest in such Sea Best/Euro/HSBC 1 note.

[5] The transfer power is endorsed by HSBC USA as assignor/transferor. Under the terms of the promissory note, Malaysian Sea Best promised to pay against the promissory note to the order of HSBC USA the amount of Euro 10,000,000, payable at the counters of Malayan Banking Berhad (Semenyih Branch) on 1 March 2008. Barclays, as holder in due course, presented the promissory note for payment on 3 March 2008 (1 March 2008 being a public holiday). It was dishonoured for non-payment. Barclays then gave notice of this dishonour and demanded that Majuikan pay the amount due on the per aval endorsement.

[6] An "aval" operates as a guarantee for payment. See the concise description given in *Byles on Bills of Exchange and Cheques* (23rd edn.):

> ... payment of a bill may be guaranteed by the signature of a third person appearing on the bill. This is called an aval. A signature by way of aval is created by the placing of a signature on the bill together with the words "bon pour aval", "bon pour aval pour les tires" or some comparable wording. If, therefore, the aval is given on behalf of the acceptor, the person so giving it assumes the liability of an acceptor; if nothing is said, the aval is deemed to have been given for the drawer ... (para 17 - 22 of the text)

[7] The learned High Court Judge allowed Barclays' claim and entered judgment against Majuikan for the total sum of Euro 10,000,000 with interest thereon at 4% per annum from 3 March 2008, and costs.

The Structure Of The Financing And The Role Of Barclays

[8] It is apparent from the record that the loan to Malaysian Sea Best was structured as a loan granted in the USA in Euro currency by an entity in USA, namely HSBC USA, but it was introduced and brokered by two US securities firms as a deal in which Barclays was involved right from the start. Thus, it was structured as first, a loan from HSBC USA backed by the promissory note issued by Malaysian Sea Best with a per aval endorsement, as guarantee, by Majuikan. The initial request was made to Barclays. The initial funding was to be supplied by HSBC USA, but the promissory note was then transferred to Barclays for value such that Barclays became a holder in due course for value with all the necessary rights and interests to present the promissory note for payment on its due date, which was to be 24 months from the date of issue of the promissory note.

[9] It is in evidence that Barclays was kept informed of the developments in securing the necessary documents in the process of due diligence. The necessary documents included the execution of the statutory declarations by the authorised signatories of Majuikan, the signing of a draft promissory note by the authorised signatories of Malaysian Sea Best as the issuer/maker of the promissory note, and the endorsement of the per aval by the two allegedly authorised signatories of Majuikan, the execution of a side letter by the representatives of Malaysian Sea Best and Majuikan,

a board of directors resolution properly passed by Majuikan to authorise the two representatives to endorse the per aval, the statutory declarations, and the side letter, a SWIFT confirmation by Majuika's Bank, and finally the actual issuance of the promissory note with the per aval endorsement.

[10] According to Barclays' submission, it was only after all these documentary safeguards were obtained and confirmed by the lawyers, that Barclays instructed HSBC USA to do the drawdown of the loan on 15 March 2009, followed with the transfer power on the same date.

The Allegation Of Forgery

[11] Majuikan, in defending the claim, argued that it did not execute the per aval endorsement. The signatures of its alleged signatories on the endorsement were claimed to be forgeries. The impugned promissory note appears on p. 885 of vol. 2(5) of the appeal record. We reproduce the entire promissory note here for a better understanding and appreciation of the case. The signatories "for and behalf of Majuikan Sdn Bhd" and "per aval for account of Malaysian Sea Best Sdn Bhd" are Mohd Nor bin Hassan (DW2) who was at the material time described as Director/Chief Executive Officer, and Mohd Khairuddin bin Abu Bakar who was described as the "Senior Manager" of Majuikan. Mohd Khairuddin was not called as a witness at the trial.

MALAYSIAN SEA BEST SDN BHD
PROMISSORY NOTE
Reference: SeaBest/ERO/HSBC1

Selangor Darul Ehsan, Malaysia 1 March 2006	In Effective EURO 10,000,000.00
On/at	1 March 2008
For value received we,	Malaysian Sea Best Sdn Bhd No. 12, Jalan P2/1, Seksyen 2, Bandar Teknologi Kajang, Semenyih 43500 Kajang, Selangor Darul Ehsan, Malaysia

PROMISE TO PAY against this PROMISSORY NOTE

To the order of:	HSBC Bank USA, National Association, 10 East 40th Street, New York, NY 10016-0200
The Amount of:	Euro Ten Million only

A Effective payment to be made in Euro only, without deduction for and free of any taxes, collection charge, impost, levies or duties present or future of any nature whatsoever, and without set-off or counterclaim.

This Promissory Note is payable at the counters of:	Malayan Banking Berhad (Semenyih Branch) 1 & 4, Taman Semenyih 43500 Semenyih Selangor Darul Ehsan, Malaysia Current Account No. 512521129097

B

C Malaysian Sea Best Sdn Bhd

…	…
Name: Gazali bin Rashid	Name: Rusita binti Mohd Aris
NRIC No: 600229-10-6583	NRIC No: 620728-10-6332
General Manager/Director	Director

D

Per Aval for account of Malaysia Sea Best Sdn Bhd
For and on behalf of Majuikan Sdn Bhd

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…	…
Name: Mohd Nor bin Hassan	Name: Mohd Khairuddin bin Abu Bakar
NRIC No: 491915-11-5193	NRIC No: 571005-10-5311
Director/Chief Executive Officer	Senior Manager

F

No. 12, JALAN F2/1, SEKSYEN 2, BANDAR TEKNOLOGI KAJANG,
43500 SEMENYIH, SELANGOR DARUL EHSAN
Tel: 03-87231266 Fax 03-8723-4368
Email: my.seabest@gmail.com

G **[12]** Majuikan further contended that the two alleged signatories were not authorised by the company to execute the endorsement, and the alleged board of directors' circular resolution of the company empowering them to so execute the per aval endorsement was also a forged document. There were other supporting
H documents, namely two statutory declarations, a draft promissory note and a "side letter". The "side letter" was also claimed to be a forgery.

[13] Majuikan tendered a chemist report through a government
I chemist (DW14; Puan Nur Musliha binti Mohamad Nor). The learned trial judge was not convinced there was forgery, noting and applying the principles as laid down by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd*

[1993] 2 CLJ 31; [1993] 1 MLJ 182, that "[the] issue whether a signature on a document has been forged is a question of fact" and that "it is eminently a matter for the trial court to determine after considering the credibility of witnesses … and taking into account expert evidence". A trial judge "is not entitled to abdicate his function by allowing an expert to determine the question". However, there was no other expert called to offer an alternative finding.

[14] The learned judge concluded in her judgment:

> The evidence by a handwriting expert can never be conclusive because it is only opinion evidence. It is trite law that the principal object of opinion evidence is merely to assist the Court to form its own opinion ...
>
> … this Court cannot come to a finding that those signatures were forged and that the Resolutions were in fact forged. Furthermore the evidence given by the former directors were unconvincing as most of the time they could not remember what exactly took place during the Board of Directors meetings.
>
> Based on all the reasons above and on the totality of the evidence before this Court Mohamad Khairuddin and DW2 had acted and represented that the 2nd Defendant would guarantee the Euro 10,000,000.00 financing granted. Therefore the 2nd Defendant is bound by the terms of the guarantee.

[15] We are of course mindful, and keep the principles uppermost in our mind, that appellate intervention should only upset the decision of a trial judge if it can be demonstrated that the judge was plainly wrong. We acknowledge that the trial judge had the audio-visual advantage of the trial process, but nevertheless the issue is whether despite having that advantage, the judge has been plainly wrong in her evaluation and findings. It suffices to refer to the Federal Court decision in *Ming Holdings (M) Sdn Bhd v. Tuan Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857; [2010] 4 MLJ 577, where James Foong FCJ dealt with the applicable principles comprehensively, as follows:

> [41] …we feel a need to remind that a trial Judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial Judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial Judge. This 'plainly wrong' test has been long established and can be observed in the judicial committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41 where Lord Fraser said:

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> In the face of that finding by the trial Judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show.

B

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial Judge.

C

[43] The first is Lord Tankerton in *Watt or Thomas v. Thomas* [1947] AC 484:

> (1) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

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> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

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> (3) The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court ...

G

The Relevant Statutory Provisions Under The Bills Of Exchange Act 1949 And The Evidence

[16] The learned trial judge found the challenged signatures on
H the per aval endorsement were not forged. Her Ladyship went further to consider the application of s. 29 of the Bills of Exchange Act 1949, and the position of a holder in due course such as Barclays. Her Ladyship found thus:

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> Based on the evidence the signatures were not forged and as a holder for value of the said PN the Plaintiff accepted the said PN in good faith and for value with no notice of defect of title to the same by HSBC USA assigning and transferring without recourse

all its rights, title and interests in the said PN by way of a Transfer Power dated 15th March 2006 which was duly endorsed by HSBC USA for value it received from the Plaintiff. The Plaintiff as a holder in due course is entitled to be paid by the 2nd Defendant. (p. 19 of the judgment)

[17] Section 29 defines "holder in due course". Section 38, more precisely s. 38(b), states the effects of being a holder in due course. Section 29 provides:

29. Holder in due course.

(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

(a) that he becomes the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

(b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of the Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

[18] Section 38 then provides what the rights of the holder of a bill are, in the following terms:

38. Rights of the holder

The rights and powers of the holder of a bill are as follows:

(a) he may sue on the bill in his own name;

(b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

A (c) where his title is defective:

(i) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

(ii) if he obtains payment of the bill the person who pays
B him in due course gets a valid discharge of the bill.

[19] We underscore the critical words in the provisions, to emphasise the point that, on the wording of the provisions, the holder of a bill/promissory note obtains a good title to it if:

C (a) the bill is "complete and regular on the face of it";

(b) he becomes a holder before it becomes overdue;

(c) he takes it without notice that it has been previously
D dishonoured, if such was the fact;

(d) he took it in good faith and for value, and at the time he took it, he had no notice of any defect in title of the person who negotiated it.

E **[20]** The holder in due course then may sue on the bill in his own name, and he holds it free from any defect of title "of prior parties" and "mere personal defences" available between these prior parties among themselves.

F **[21]** Based on these provisions, the learned judge concluded therefore that the issues of falsification/forgery, or any defect of title or other personal defences, were issues (if any) that might be available to Majuikan as against Malaysian Sea Best and/or HSBC USA, being the prior parties to Barclays, but these were not
G defences available to the Majuikan against Barclays since Barclays was a holder in due course of the said promissory note.

[22] The learned judge also considered Majuikan's argument that Barclays was negligent for not undertaking a proper due diligence, and said:

H

> Both the documentary and oral evidence show that the Plaintiff did if fact conduct proper enquiry. The Statutory Declarations, the side letter, BOD resolutions, SWIFT Confirmation [and] the letter from Bank Negara clearly show that before accepting the
I assignment of the PN the Plaintiff had perused all the documents. This is confirmed not only by PW1 but also PW2 (Bank Negara officer). I am satisfied based on the evidence before me that the Plaintiff was not negligent and had conducted proper and thorough due diligence.

[23] Hence, according to counsel for Barclays, this finding is a strong finding of fact upon an assessment of the evidence by the learned judge.

[24] Majuikan's arguments challenge these findings. Firstly, it is argued that Her Ladyship should have found the defence of forgery to be well founded based on the chemist's report. The per aval endorsement was not signed by Majuikan or its officers. The purported endorsement is therefore invalid, void and effective. Second, it argued that Her Ladyship erred in concluding that Barclays was a *bona fide* holder in due course of the promissory note. Third, the learned judge erred in holding that Barclays was not negligent and had conducted a thorough and proper due diligence. Had it done so, it would have revealed that Majuikan was neither in the position of guaranteeing loans, nor in a financial position to guarantee the Euro 10,000,000 promissory note. According to the grounds in the memorandum of appeal, "the respondent had failed to conduct any proper inquiry into the promissory note, which would have revealed ... that something was manifestly wrong with the transaction, therefore that Barclays lackadaisical and negligent manner imputes upon it notice of defect to title to the promissory note". Fourth, the learned judge erred by holding that Mohd Nor bin Hassan and Mohd Khairuddin had represented that Majuikan would guarantee the loan and therefore made the appellant bound by the term of the per aval endorsement "when there were significant issues of forgery, fraud, bad faith and negligence such as to render this conclusion wholly inappropriate and the promissory note invalid in law". This argument refers to the two statutory declarations signed by Mohd Nor and Mohd Khairuddin, which were proven to have been signed by them even by the chemist's report.

[25] The relevant grounds in this regard in the memorandum of appeal read:

> The Learned Judge erred in law and in fact when:
>
> (a) Her Ladyship gave extra weight to the issue of the Statutory Declarations ("SD") by Mohd Nor bin Hassan (DW2) and Mohd Khairuddin bin Abu Bakar both dated 05/10/2005 (Exhibits P-5 (i) and (ii)) executed supporting the Promissory Note being genuine whereas they were not the basis for the Respondent's claim and were not relevant as indicators of the Appellant's officers' authority, failing to appreciate the extensive evidence given by the Appellant, demonstrating that events before and after the execution of the SD which showed that the SD has no weight or legal effect whatsoever.

A (b) Her Ladyship failed to address the fundamental question of whether the signatures of Mohd Nor bin Hassan and Mohd Khairuddin bin Abu Bakar on the Promissory Note were fraudulent and Her Ladyship ignored or failed to properly consider the evidence of the Chemist and the consistent oral testimony of Mohd Nor bin Hassan that the Promissory Note was forged, which meant that the decision of the court was not based on the consideration of the relevant issues, but the irrelevant statutory declaration, when in any event the Promissory Note was invalid due to forgery.

C **[26]** The case for Majuikan was advanced on the basic premise that Barclays was not in reality a holder in due course. Barclays was involved in the loan right from the start. The transfer power (the negotiation of the note) was only a part of the financing structure, and thus Barclays should not be allowed to shelter D behind the legal concept of holder in due course for value, if it was proven on the evidence that the per aval endorsement, the side letter and the board of directors resolution were forged.

[27] The written submission for the appellant puts the argument E in forceful terms thus:

With the greatest respect, the appellant humbly submits that in order to try to get the protection of a "*bona fide* purchaser for value without notice of defect", the respondent had used HSBC USA as a "front" to be the first purchaser. Therefore, the F respondent was not acting *bona fide* in respect of this transaction.

[28] Majuikan relied on ss. 23, 24 and 32 of the Bills of Exchange Act in buttressing its case. To quote provisions:

23. Signature essential to liability

G No person is liable as drawer, indorser or acceptor of a bill who has not signed it as such:

Provided that:

(a) where a person signs a bill in a trade or assumed name, he H is liable thereon as if he had signed it in his own name;

(b) the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

I 24. Forged or unauthorized signature

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized

signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under the signature, unless the party against whom it sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

32. Requisites of a valid indorsement

An indorsement in order to operate as a negotiation must comply with the following conditions, namely:

(a) it must be written on the bill itself and be signed by the indorser; ...

[29] The effect of these provisions is that the forgery or want of authority will render the bill "wholly inoperative", unless the maker or indorser of the bill is "precluded" from setting up the forgery or want of authority, in other words, "estopped" from doing so. According to Majuikan's argument, Barclays cannot take advantage of the shelter of *bona fide* holder for value, since it is clear from the evidence that Barclays was in fact an immediate party to the bill. Barclays was in the loop right from the start, and its legal and compliance departments were directly involved in drafting the required board of directors resolution for Majuikan, and monitoring the preparation and execution of the necessary documents. Barclays only authorised HSBC USA to release the loan sum when Barclays was satisfied that the documentation was in order. It was only then, and on the same day (15 March 2006), that the transfer power was effectuated in favour of Barclays. The exchange in cross-examination between Majuikan's leading counsel and PW1 (Mark Christensen; the principal witness for Barclays) highlights this point very clearly:

SA (Counsel):	Let me get it in my mind. Barclays instructed HSBC to release the money to Sea Best on 1.3.2006 is it?
PW1:	Not on 1.3.2006.
SA:	But as per the instruction the money was released on 1st March?
PW1:	No.
SA:	No? Ok.

A PW1: The money was released, we instructed HSBC to release the money on 15.3.2006.

SA: But you had purchased it by 1.3.2006?

PW1: No. We haven't purchased the Note until all the documentation was received. That final piece of
B documentation was received, ...

Email from Scott Wright to Chris Allen and myself within the plaintiff dated 2.12.2005 enclosing the draft in final form. Promissory Note, signed letter, Draft Local Law legal opinion (All
C attached) and suggesting that the 2nd Defendant's Board of Directors Resolution would be available by 19.12.2005.

This document along with others satisfied the requirements that Barclay's Legal Department and Barclay's Compliance Department needed in order to proceed with the transaction ...

D

PW1 also described the background to the transaction:

In August 2005, Cambridge Securities, a securities broker based in Cambridge, Massachusetts and acting as introducing broker for MS Trade Finance, a Trade Finance Broker based in New York,
E approached the Plaintiff with a proposal to lend to the 1st Defendant. We were told that the 1st Defendant was a supplier of seafood products under contract by the 2nd Defendant. The lending was to be secured by the Promissory Note, as guaranteed by the 2nd Defendant.

F An arrangement was reached whereby HSBC was to provide the lending and thereafter assign the Promissory Note to the Plaintiff in consideration of the Plaintiff purchasing the loan from HSBC. The Plaintiff would therefore become holder in due course of the Promissory Note.

G A due diligence process was commenced on both Defendants in keeping with our "know your client procedure" and between October 2005 to December 2005.

[30] From this explanation, it is clear that in this "arrangement",
H brokered by a securities firm and trade finance firm in Cambridge and New York respectively, the first approach was made to Barclays, but it was arranged as a loan by HSBC USA which was to be assigned to Barclays for it to be a holder in due course of the promissory note. The due diligence process was conducted by
I Barclays between October and December 2005.

The Issue Of Forgery And Holder In Due Course

[31] The issue therefore is whether the court can truly and justly regard Barclays as a genuine holder in due course for value of the promissory note, in the face of alleged forged documents?

[32] Were some of the important documents forged? The learned judge found they were not, and discounted the expert evidence on this.

[33] We have reviewed the findings of the learned judge on the expert evidence of DW14, who is a certified document examiner from the Chemistry Department. For a start, since no other handwriting expert was called, the court really had no plausible basis to reject her evidence outright. While it is true that her report is relatively brief, as reports from our Chemistry Department often are, it will be an error to simply conclude that therefore the expert has not provided the basis for her analysis and cogent reasons for her conclusions. The strict view appears to flow from the decision of the High Court in *Lee Shuan Chan v. Lee Shin Kuang @ Lee Sen Bin & Ors* [2012] 1 LNS 14; [2012] MLJU 42 (relying on the Supreme Court decision in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182). In our view, however, the court should also proceed to consider the totality of the expert's evidence by considering the expert's oral testimony as well. The *United Asian Bank* case, in our view, does not stipulate that the reasons and the basis of the analysis must be stated on the face of the expert report.

[34] Counsel for Majuikan has, on the other hand, stressed that we should also consider the other general principle on handwriting expert evidence in relation to unopposed expert evidence. Counsel cites *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] 1 LNS 679; [2009] 7 MLJ 681, where Ramly J (as His Lordship then was) held: "... the court may not reject unopposed expert evidence unless the evidence is 'obviously lacking in defensibility'". This High Court decision in fact cited and applied the principles laid down in two Singapore Court of Appeal decisions, namely *Saeng-Un Udom v. PP* [2001] 3 SLR 1, and *Dr Lo Sook Ling Adela v. Au Mei Yin Christina & Anor* [2002] 1 SLR 408. In the latter case, Chao Hick Tin JA held:

> In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds ...

[35] We are in agreement with these principles and in our view, a judge who is not an expert himself, should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case. Such a principle is in accord with the principle that the court is the final arbiter, as stated in *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61:

> ... the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter, not the experts or witnesses ... The learned Judge should have considered the reasoning given by the expert and with that assistance arrive at the conclusion. In failing to do so the learned Judge had abdicated his function. The learned Judge is entitled to reject the evidence but not before considering such evidence ...

[36] After considering the testimony of DW14 as a whole, we do not find the opinion of this expert to be obviously indefensible. On the contrary, her conclusions are supported by the basic facts of the case. Aside from the oral evidence of DW2 (Mohd Nor bin Hassan) who only admitted signing the draft statutory declaration, there are also the evidence of the persons who allegedly as former directors signed the circular resolution of Majuikan authorising the giving of the guarantee by the per aval endorsement, and authorising Mohd Nor and Mohd Khairuddin as the authorised signatories of the company.

[37] This directors' resolution is allegedly passed under art. 88 of Majuikan's articles of association, which means to say it is a circular resolution signed by all the directors of the company. It is dated 14 February 2006. It is signed purportedly by eight of the then existing directors: Adam bin Abdul Hamid, Mohd Nor bin Hassan (DW2), Haji Omar bin Othman (DW6), Khalifah binti Rose (DW5), Sheikh Ahmad bin Sheikh Long (DW3), Zaitun binti Ibrahim (DW 10), Mohd Mokhtar bin Ismail (DW7) and Jusoh bin Awang (DW4). On its face, it is strikingly questionable, for Mohd Nor bin Hassan and Sheikh Ahmad bin Sheikh Long had then ceased being directors of the company. As at 14 February

2006, there were only six directors of the company, not eight. Mohd Nor bin Hassan had resigned on 16 December 2005, whilst Sheikh Ahmad bin Sheikh Long's resignation as director had been accepted by the company at a proper board of directors meeting held on the same date, and during which he did not attend. As of that date, Mohd Nor was not a director but was the chief executive officer of the company.

[38] Except for Adam bin Abdul Hamid (then the chairman), all these persons were called as witnesses, and all denied signing the circular resolution. It is also very strange, to put it mildly, that there was no discussion minuted during the proper board meeting held on the same day as the circular resolution to any effect that Majuikan was about to allow the indorsement of the per aval guarantee for the huge sum of Euro 10,000,000.

[39] The company secretary for Majuikan, Norjan binti Ahmad Shah (DW12), also provided strong evidence that she did not prepare the circular resolution, and at the meeting of 14 February 2006, there was no discussion whatsoever on the giving of the guarantee. DW12 further testified that even the format and font used were different. A sample circular resolution of Majuikan was provided. It appears as exh. D46, which can be found on p. 956 of vol. 2(6) of the appeal record.

[40] Mahbub bin Dardak, who testified as DW11, was the Manager for Corporate Affairs for Majuikan at this material time. He too attended the meeting of 14 February 2006 but said he was not aware of any discussion being held on the giving of the guarantee, and he never forwarded the disputed circular resolution to any of the directors for signing.

[41] The expert opinion of DW14 does not conflict with these basic facts. To summarise the findings (which appears on pp. 984 - 987, appeal record, vol. 2(6)), DW14 was firm on her finding that Mohd Nor and Mohd Khairuddin did not sign the promissory note dated 1 March 2006 or the side letter dated 1 February 2006, but found that both did sign the statutory declarations dated 5 October 2005. As for the circular resolution dated 14 February 2006, she was equally firm that Adam bin Abdul Hamid, Sheikh Ahmad bin Sheikh Long and Mohd Nor did not sign the resolution. As for the signatures of Zaitun bin Ibrahim, Omar bin Othman, Mohd Mokhtar bin Ismail, Khalifah binti Rose and Jusoh bin Awang, she could not come to a definite decision

because these questioned signatures could not be compared with the specimens given due to the "the different structures". This is a fair and honest assessment, but even to the naked eye, these signatures on the circular resolution are structurally very different when compared with their signatures which appear in the sample board resolution tendered in court, which we have alluded to earlier. Thus, the probabilities are such that when the evidence is viewed as a whole, it is most probable that there was forgery of the critical documents, namely the circular resolution, the side letter and the per aval endorsement on the promissory note.

[42] Unfortunately, the learned judge failed to address these probabilities on the basic facts read together with the expert report, but she chose instead to be influenced by the theory that the authors themselves could have traced their own signatures in the circular resolution. The expert had found there were elements of tracing. Counsel for the appellant has pressed the argument on the "sheer implausibility of multiple directors all tracing their signatures". Why would they do so? Is it plausible that they did so to ensure that Majuikan would be able to escape liability by alleging forgery later on? With respect, the probabilities on the entirety of the evidence of this happening must be extremely minute. This is a theory that deserves to be rejected for its sheer implausibility and lack of inherent logic.

[43] In these circumstances, Barclays cannot shelter behind the rule protecting a holder in due course despite the forgery, since Barclays was involved in the transaction right from the start, and the transfer power was a device in the overall structuring of the financing. The mercantile underpinning of the rule relates to the need to protect the negotiability of bills of exchange. On the facts here, there exists no genuine negotiation of the promissory note, and therefore it will be wrong in principle to treat Barclays on the same basis as an ordinary holder in due course.

[44] See the very helpful commentary in *Ellinger's Modern Banking Law by Ellinger, Lomnicka and Hare* (5th edn.) for the rationale of the protection given to a holder in due course:

> Under section 38(2) of the BEA 1882, a 'holder in due course' holds the bill of exchange free from any defects in the title of previous parties, as well as free from any equities available to prior parties among themselves, and may consequently enforce payment against all the parties liable on the instrument. In this way, the provision enables bankers and other financial institutions

> to discount bills of exchange without getting embroiled in disputes concerning the underlying business contracts. Thus, where the discounter is a holder in due course, he can enforce the bill of exchange against a drawee who has accepted it in the mistaken belief about the genuineness of a forged bill of lading that was attached to the instrument ... (at p. 433 of the text)

[45] We note, of course, that the learned judge referred to the Federal Court decision in *Mercantile Bank Ltd, Ipoh v. Yoon Siew Kang* [1969] 1 LNS 107, and the citation and approval of the principles in *Swan v. The North British Australasian Company* [1983] 159 ER 73 and *Jones v. Gordon* [1877] 2 App Cas 616. These cases states the general principle encapsulated in s. 38(b) of the Bills of Exchange Act, with which we do not disagree. In *Swan*, for example, the rationale behind the general rule is stated in the rather hyperbolic language reflective of its era, thus: "The object of the law merchant, as to bills ... is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend ...".

[46] Our conclusion in this regard is based on the commercial reality of the factual matrix of this appeal. In our view, Barclays cannot be regarded as a holder for value in due course without qualification. Barclays is in reality a direct party in the financing structure, not just an ordinary holder for value in due course of the promissory note.

Whether There Was Estoppel By Representation: S. 24

[47] In the course of the submissions, however, counsel for Barclays has gone to great lengths to explain the sequence of events leading to the endorsement of the per aval guarantee, the release of the loan by HSBC USA to Malaysian Sea Best and the transfer power to Barclays. In short, it was argued that Barclays had done all that was necessary in terms of due diligence to ensure the legal integrity of the financing, and were led to believe that everything was in order by the conduct of the representatives of Majuikan, to the extent that this was a situation where the exception to s. 24, alluded to earlier, applied. To recapitulate, s. 24 states that a forged or unauthorised signature is wholly inoperative "unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority".

[48] Counsel has analysed in logical detail the sequence of 22 events from March 2005 to April 2008. To do justice to her effort, and for exactness of exposition, we reproduce with necessary simplification, the "chronology of events" as submitted to us.

Chronology Of Events

1.	Appellant enters into contracts for supply of seafood produce with D1 as main supplier [3 years contract commencing 1.6.2005 and extended to cover 14 outlets]	March 2005 - June 2005
2.	Cambridge Securities [securities broker in Cambridge, Massachusetts] and MS Trade Finance acting as introducing broker approach Respondent on lending to D1 by HSBC NY to be secured by Promissory Note and Appellant's Guarantee.	August 2005
3.	DW2 (Mohd Noor Bin Hassan - Appellants' CEO) and Khairuddin [Appellant's General/Senior Manager Sales and Marketing sign Statutory Declaration acknowledging Appellant will act as Guarantor and execute par aval Guarantee [DW2 admits he signed, at a meeting attended by D1, their solicitors and Khairuddin, aware Appellant's Co-signatory had signed and SD released to D1 and their solicitors for stamping].	5.10.2005 Staturory Declaration forwarded to Respondent with email on 2.11.2005
4.	Draft Promissory Note signed by DW2 [DW2 admits also signing on 5.10.2005 Draft Promissory Note and that all other signatures for D1 and Khairuddin complete and that documents will be used by D1 to take Financing].	5.10.2005
5.	Bank Negara Malaysia's letter to Appellant approving Appellants's Guarantee of Euro 10 Million Financing. Bank Negara Manager Foreign Exchange	29.11.2005 Forwarded to Respondent on [1.12.2005]

	Unit confirms no response from Majuikan to letter and Letter confirmed received by Appellant (DW2 says he sighted same by 2.12.2005).	
6.	Respondent carries out due diligence on Appellant and D1.	October 2005 - December 2005
7.	Messrs Abu Zahar Syed Mohd Fuad & Partner's [D1's solicitors] write to Appellant [attention DW2] forwarding Side Letter, Promissory Note and draft Resolution for Appellant's action and highlighting the need for a guarantee from the Appellant. DW2 admits receiving letter.	29.11.2005
8.	Messrs Abu Zahar Mohd Fuad & Partner's letter reminder [attention DW2] to Appellant forwarding HSBC NY letter of offer, format of Board Resolution, Bank Negara letter confirming registration of Appellant's Guarantee and addressing Appellant's "concern on the wording of the guarantee par aval". DW2 admits receipt/reading letter and instructing Khairuddin that no response needed because Appellant was not a Guarantor.	7.12.2005
9.	Appellant's Board of Director Circular Resolution authorizing the Guarantee and Side Letter.	14.2.2006
10.	Appellant's letter to Maybank instructing Malayan Banking Berhad (Maybank) to provide SWIFT transmission on Appellant's signatories in relation to Euro 10 Million Facility by HSBC. PW3 - Maybank Manager confirms letter sent to Bank by Khairuddin.	23.2.2006
11.	Side Letter by Appellant and D1 confirming HSBC Financing/Promissory Note and Guarantee.	1.3.2006, P13
12.	Promissory Note containing signatures of DW2 and Khairuddin for Appellant as Guarantor	1.3.2006, P22

13.	HSBC NY letter to Maybank advising of Euro 10 Million Financing involving Appellant AND seeking SWIFT confirmation that DW2 and Khairuddin authorised signatories of Appellant so as to complete transaction.	3.3.2006
14.	Maybank's letter to Appellant forwarding HSBC New York request for SWIFT [item 13] and Appellant's own letter [item 10]. PW3 explained she handed P26 to Haji Adam Abdul Hamid Appellant's Chairman on 13.3.2006, who initialed same to confirm receipt and she met Haji Adam again on 15.3.2006 when he wrote on P26 to confirm that Appellants 23.2.2006 letter in order and Swift to be provided.	13.3.2006
15.	SWIFT Transmission from Maybank to HSBC NY.	13.3.2006 Forwarded to Respondent under cover. 16.3.2006 email
16.	SWIFT Transmission from CIMB confirming details of Appellants account and signatories.	13.3.2006
17.	Following receipt of all original documents, funds released by HSBC NY to D1. HSBC executes Transfer Power confirming Respondent as Holder of Promissory Note for Value.	15.3.2006
18.	Messrs Johanna (Appellant's solicitors) letter to Messrs Abu Zahar Syed Mohd Fuad [purporting to reply to item 8 above] and stating that Appellant not Guarantor on Facility	19.7.2006
19.	Messrs Johanna & Co's letter and reminder to Bank Negara [purporting to reply to item 5 above] and seeking that registration of Guarantee be cancelled.	21.7.2006 and 3.11.2006
20.	Messrs Johanna & Co's letter to Malayan Banking Berhad advising Appellant was not/was withdrawing as guarantor.	26.7.2006

21. DW1 presents Promissory Note at Maybank for payment [Payment not received]	1.3.2008	A
22. Respondent's solicitors letter of demand on Appellant and D1.	6.3.2008	
23. Police Reports lodged by Appellant's Directors	4.7.2006 - 5.4.2008	B

[49] The three principal actors from Majuikan in the scenario presented are Mohd Khairuddin bin Abu Bakar, Mohd Nor bin Hassan and Adam bin Abdul Hamid. Mohd Khairuddin was the Senior Manager for Sales and Marketing, Mohd Nor bin Hassan was the Chief Operating Officer, and Adam bin Abdul Hamid was the Chairman of the company. Of the three, only Mohd Nor bin Hassan was called as a witness. Apparently, Majuikan attempted to contact Adam bin Abdul Hamid, but was unsuccessful. It is less clear why Mohd Khairuddin was not called to testify. We were informed during the submissions that he was then facing a criminal charge.

[50] Who exactly forged the circular resolution of the board, the side letter and the par aval endorsement remains an open question on the evidence before us. But, from the sequence of events, we know the statutory declaration itself was signed by Mohd Khairuddin and Mohd Nor. This was even stamped. Mohd Nor does not deny this. Mohd Nor and Mohd Khairuddin also signed a draft per aval endorsement. These acts suggest very strongly, that Majuikan knew through them that a financing was being arranged for Malaysian Sea Best, for which a guarantee was required from Majuikan in the form of the per aval endorsement as security. An application was made to Bank Negara for approval of the guarantee since it was denominated in Euro. Bank Negara approved the giving of the guarantee. Mohd Nor was aware of this as early as December 2005. The solicitors for Malaysian Sea Best (Messrs Abu Zahar Syed Mohd Fuad wrote to Majuikan (for the attention of Mohd Nor) forwarding the necessary documents (side letter, promissory note and a draft resolution). This was in November 2005. A reminder letter was sent by the same solicitors in December 2005. Mohd Nor admitted receiving both letters, but there were no immediate response. However, according to Mohd Nor he minuted to Khairuddin on the reminder letter that no response was needed, in terms as follows: "Kita tak perlu hantar kerana tidak jadi penjamin korporat dalam pinjaman

ini". Apparently, he minuted this instruction on 9 December 2005. (Counsel for Barclays deemed this evidence to be an "afterthought"). HSBC USA then required verification *via* SWIFT from Majuikan's bankers on details of the accounts of Majuikan and a verification of Majuikan's authorised signatories. Mohd Khairuddin wrote to Malayan Banking to indicate that the bank had Majuikan's consent to release the details. This letter from Mohd Khairuddin dated 23 February 2006 is interesting in terms of its content. In its second opening sentence, the latter informed the bank: "Please be informed that the company (Malaysian Sea Best) has been granted the above Facility from HSBC Bank USA, NA, New York (HSBC) and we are progressing to the final stage for the closing of the transaction". HSBC then wrote directly to Maybank, for the attention of Puan Maimun bt Rahman (PW3), Assistant Vice President, stating:

> Reference: Majuikan Sdn Bhd
>
> HSBC is in the final process of settling a Euro 10,000,000.00 financing involving your client Majuikan Sdn Bhd. In order to complete the settlement, we require a SWIFT from yourselves confirming that Mohd Nor bin Hassan and Mohd Khairuddin bin Abu Bakar are authorized signatories on the Company's account at your bank ...

[51] Puan Maimun wrote to Adam bin Abdul Hamid, who was the chairman of Majuikan then for instruction whether the bank should proceed with the confirmation to HSBC USA. Adam bin Abdul Hamid minuted on the letter to Puan Maimun informing that the HSBC USA's letter was in order and requesting her to proceed with the confirmation.

[52] HSBC then received two SWIFT confirmations, from Maybank and CIMB Bank respectively on 13 March 2006. The SWIFT confirmations were forwarded to Barclays on the same day by HSBC USA.

[53] The funds were released to Malaysian Sea Best on 15 March 2006, after HSBC USA and Barclays were satisfied the "original" documents had been received. On 13 February 2006 itself, the transfer power was executed by HSBC USA.

[54] It is worthwhile to also note that when Mohd Nor subsequently found out about the forgery in July 2006, the lawyers for Majuikan were instructed to reply to the solicitors for Malaysian Sea Best. Letters were also written to Bank Negara to

cancel the guarantee, which Bank Negara did. A letter was also sent to Maybank by the lawyers advising the bank that Majuikan was not a guarantor. The directors also lodged numerous police reports.

[55] It is telling that Majuikan did not choose to write directly to either HSBC USA and/or Barclays to inform these parties of the forgery and the cancellation of the guarantee by Bank Negara.

[56] Granted that the per aval endorsement was forged, as were the side letter and the circular resolution, can Majuikan still claim it cannot be liable to Barclays under s. 24 of the Bills of Exchange Act?

[57] The exception under s. 24 encapsulates the doctrine of estoppel. The commentary in Hedley, *Bills of Exchange and Bankers' Documentary Credits* (3rd edn.) is useful to consider:

> It will be remembered that s. 24 of the Bills of Exchange Act 1882 provides that a forged signature is "wholly inoperative" for all purposes, "unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery …

[58] If a man knows that his signature has been forged and by his actions or his silence willingly leads others to believe that the forgery is his genuine signature he cannot later plead that his signature was forged. In short, he will be estopped from denying the signature to be his ... (at pp. 116 to 117).

[59] See also *Byles on Bills of Exchange and Cheques* (28th edn.):

> In *Greenwood v. Martins Bank Ltd* it was held that where a customer's signature is forged, it is the duty of the customer, on discovering the forgery, to inform the bank, and if he deliberately abstains from doing so, with the result that the bank loses its remedy against the forger, the customer is estopped from relying on the forgery; and it is immaterial that the bank was guilty of negligence in not detecting the forgery.
>
> That principle was acknowledged by the Privy Council judgment of Lord Scarman in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd*. An employee of the defendant bank's customers issued forged cheques but the Court of Appeal in Hong Kong accepted that the customers owed a reciprocal duty of care to the bank in the conduct of the account to check their statements, and advise the bank of the forgeries thereby discovered. The customers appealed and Lord Scarman decided in their favour; his views

A being followed by other members of the Judicial Committee. The customers were not under a general duty to check their accounts and were not estopped from disputing the transactions; the only exceptions placing an onus on the customer were the principles enumerated in the cases of *Greenwood v. Martins Bank and London Joint Stock Bank v. Macmillan and Arthur.* In the former case, the
B customer had discovered a forgery and did not tell the bank and further forgeries followed; the latter case was an instance in which a customer had drawn a cheque leaving a space that permitted a non-apparent alteration up words of both figures and words ...

C It would seem that in order to give rise to an estoppel a party must have actual knowledge, or at least be "willfully blind" to the forgery, and that constructive notice is not enough ... (at pp. 284-285 of the text)

[60] The doctrine of estoppel by representation, as reflected in
D these cases cited in the commentaries, has been adopted by our Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31.

[61] The evidence in this appeal demonstrates clearly that the
E Majuikan never took any active steps to alert or inform Barclays of the forgery, and in failing to do so, had led Barclays to believe all was in order to Barclays' detriment.

[62] The written submission of counsel for Barclays presses this
F point in a very relevant manner:

The Appellant's own witnesses accept that the Appellant discovered the purported forgery of the Promissory Note by June 2006 yet the Appellant took no action to inform HSBC/ Respondent of the purported forgery, thereby preventing HSBC/
G Respondent from taking immediate steps to mitigate its position. In fact, the Respondent only learnt of such allegations of forgery after a call was made on the Promissory Note in 2008, some 1 1/2 - 2 years later.

[63] Majuikan had chosen to be "wilfully blind" to the forgery in
H its relationship with HSBC and Barclays, and therefore must be held to be precluded from setting up the forgery against them. It is no answer to simply assert that Bank Negara or Maybank should have informed these parties. This kind of argument is nothing short of an attempt to shift the blame.

I

[64] In these circumstances, Majuikan should in fairness be held accountable, even though there was forgery of the mentioned documents. Majuikan has no one else to blame except itself. How

such lax corporate governance has come to infect this company in the manner it did gives much food for thought. In its essence, this case is about reconciling established mercantile rules and custom against this particular style of corporate governance in Malaysia, and unfortunately for Majuikan, on the facts of this case mercantile rules and custom must hold sway. The issues of law here do not concern the "indoor management" rule or the limits of representation of an agent based on normal agency principles. The law to be considered on the facts of this appeal is the effect of the specific provision (s. 24) of the Bills of Exchange Act 1949. Thus, the principle against self-authorisation as expounded, for example, *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and another appeal* [2011] 3 SLR 540, cited before us, does not apply; nor, with respect, the exception to *Turquand*'s rule that the indoor management issue only affects internal irregularities which might affect a genuine transaction but not an illegality.

[65] In these circumstances therefore, we are dismissing Majuikan's appeal.

The Cross-Appeal

[66] As noted at the outset of this judgment, Barclays has filed a cross-appeal. However, counsel for Barclays did qualify in the submission before us that the cross-appeal would be pursued only in the event if we were minded to allow Majuikan's appeal. Since we are now dismissing the appeal, the cross-appeal becomes less relevant. Nevertheless, counsel for both parties made submissions before us on the cross-appeal.

[67] We are mindful that the application to introduce new evidence of "money trail" to show that Majuikan's then chairman, Adam bin Abdul Hamid, received monies under the financing facility disbursed to Malaysian Sea Best, and thus must have known about the guarantee given by Majuikan when he instructed Maybank to provide the SWIFT confirmation. Counsel for Barclays explained to us that this information was obtained after the parties had closed their case and were in the process of preparing their written submissions. This evidence came to the fore only in the course of a criminal proceeding in a money laundering trial under AMLATFA involving a director of Malaysian Sea Best.

[68] The learned trial judge in her discretion dismissed the application. Although we are minded to find that this further evidence is relevant, still it was sought to be introduced too late in the day. Quite apart from it being hearsay, we find that the prejudicial value will far outweigh the relevancy. Nevertheless, we agree with counsel for Barclays on the point of law advanced that Barclays is not precluded under the rules to file this cross-appeal to be heard on the main appeal. The ruling by the learned judge here is on an issue of admissibility of evidence in the course of a trial. It does not finally dispose of the rights of the parties, and further, we are of the view it is not as well in the nature of an interlocutory appeal, being made in the course of trial, and not before.

Conclusion

[69] For the reasons stated above, we are unanimous in dismissing this appeal with costs. We disagree with the learned trial judge's findings on the forgery of the documents, but nonetheless the appellant cannot succeed in this appeal based on s. 24 of the Bills of Exchange Act 1949. The appellant (Majuikan) as the party against whom it sought to enforce payment of the bill is precluded from setting up the forgery or want of authority given its representation by conduct through its officers which gives rise to a clear estoppel in law.

[70] The judgment of the High Court is affirmed. We award costs of RM30,000 as costs of this appeal to the respondent. The deposit is to be refunded to the appellant.

[71] Finally, as for the cross-appeal, counsel for the respondent has indicated that no order on the cross-appeal is required in the circumstances. We agree.